HARRIS MOHD SALLEH

v.

THE RETURNING OFFICER – ISMAIL HJ MAJIN & ORS (NO 3)

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RICHARD MALANJUM J
[ELECTION PETITION NO: K5-1999]
24 DECEMBER 2001

CIVIL PROCEDURE: *Stay - Application to 'stay' a stay order staying decision of election judge - Whether application if allowed would lead to a review of stay order - Whether application was contrary to public interest - Whether court has jurisdiction to 'stay' the stay order - Whether there was res judicata - Where there was urgency to 'stay' the stay order - Whether there were special circumstances - Whether balance of convenience was not in favour of application*

This court had earlier granted a stay to the 2nd respondent ('Stay Order') to stay the decision of the election judge pending his appeal to the Court of Appeal. The election judge had held the election of the 2nd respondent in the Sabah State Election 1999 for the Likas Constituency null and void and ordered a fresh by-election. The 2nd respondent contested in the by-election and won the said election. The petitioner applied to the Court of Appeal to 'stay' the Stay Order pending his appeal against the Stay Order to the Court of Appeal but that was struck out on lack of jurisdiction. The petitioner now applied to this court for 'stay' of the Stay Order.

Held:

[1] The petitioner was in fact asking this court to disable the Stay Order pending his appeal against it in the Court of Appeal. Meanwhile it was common ground that the Stay Order had stayed the effects of the judgment upon the 2nd respondent pending the disposal of his appeal before the Court of Appeal and in the interim period the 2nd respondent was allowed by the relevant authority to contest in the by-election. Therefore, in so far as preventing the 2nd respondent from contesting in the by-election by reason of the effect of the judgment, that was now a non-issue. There was therefore nothing more to disable in the Stay Order connected to the conduct of the by-election. (p 437 g-h)

[2] If the order sought for by the petitioner was granted, the Stay Order would be made inoperative and the full force of the judgment would be revived. That would mean that the real aim of the present application was for this court to review the previous order granted in the exercise of its discretion. On this ground alone, the application of the petitioner should be refused. Further, that the judgment would continue to be stayed due to the Stay Order which in turn would be stayed if the application of the petitioner was granted would be very unhealthy for the system and contrary to public interest as a situation would be created whereby the people of the constituencies concerned would be left without any representative so long as the appeals in the Court of Appeal were pending. (p 438 a-d)

[3] There is jurisdiction of this court to hear an application for stay over a stay since it is a matter of discretion. In considering such an application, several factors come into play, such as, whether the court is *functus officio* as in the present application and thus decline to grant the order sought for by the petitioner. But there may be a situation where a stay over a stay is necessary in the interest of justice. (pp 438 h & 439a)

[4] As for the issue of *res judicata* the court agreed with the 2nd respondent that the points raised in this application had been canvassed in the earlier application. There might be new points that were not argued nor fully argued during the first application but there were also old points being revived which this court had taken into account when granting the Stay Order. Therefore, such a stand only enhanced this court's view that indeed the aim of this application was to ask this court to revisit its earlier decision made in the exercise of its discretion. That should not be allowed and the remedy for the petitioner was that he should pursue his appeal in the Court of Appeal. Moreover, it was made quite clearly in the judgment for the Stay Order that some of the points raised in the arguments should be for the higher courts to consider. (p 439 b-d)

[5] The Court of Appeal which had an opportunity to look into the appeal of the petitioner did not find any urgency to hear the appeal. However, if the petitioner was still convinced that urgency was still prevailing then there was no reason for him to unnecessarily labour before this court when he should be requesting the higher court for a date. Nevertheless, this court was not persuaded that there was an urgency to stay the Stay Order. (p 439 e)

[6] The petitioner's grounds of nugatory, delay and public interest to support the ingredient of special circumstances was answered by the Court of Appeal when the appeal by the petitioner was heard. Their Lordships did not find any urgency as to warrant an early hearing of the appeal. The circumstances raised by the petitioner before this court would have been taken into account by the appellate court. (p 440 b)

[7] This court had considered that the judgment was not appealable, that the Stay Order had the effect of preventing the implementation of the election laws and the Election Commission from carrying its duties, that a High Court has no jurisdiction to stay a judgment of an Election Court and that the Stay Order was bad in law for want of time frame. However, if this court were to exercise its discretion and grant the prayer sought for, the ultimate consequence would in effect be reversing the Stay Order and that would be quite undesirable. Therefore, the balance of convenience tilted against the grant of the order prayed for. (p 440 d-f)

[8] The petitioner did not stand out to be affected more than any other citizens of the State or the voters of the two constituencies by the alleged continuing infringement of the relevant laws after the delivery of the judgment. If anyone had the duty or right to complain it should be the Election Commission. (p 441 d)

[Application dismissed.]

Case(s) referred to:

Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors [1995] 2 CLJ 392 ***(dist)***

Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors [1995] 3 CLJ 493 ***(refd)***

For the petitioner - Ansari Abdullah (Redzuan Borhan); M/s Ansari & Co

For the 2nd respondent - Alex Decena (Lim Pitt Kong, John Sikayun & Lawrence Chong); M/s Luping & Co

Reported by Usha Thiagarajah

JUDGMENT

Richard Malanjum J:

Before me is an application by way of summons in chambers dated 11 July 2001 (encl. 25) by the petitioner for an order of stay of the Stay Order (Stay Order) that I granted on 4 July 2001. This application is supported by an affidavit of the petitioner affirmed on 11 July 2001 (Harris's affidavit).

The 2nd respondent is opposing this application and has filed an affidavit in opposition affirmed on 19 July 2001 (Yong's affidavit).

To recap, the Stay Order was granted on the application by the 2nd respondent in connection with the judgment (the Judgment) of the Election Court in Election Petition No. K.5 of 1999 wherein the election of the 2nd respondent in the Sabah State Election 1999 for the Constituency of N 13 (Likas) was declared void and that a fresh by-election was ordered.

The Judgment of the Election Court also touched on a point whereby the effect would be, *inter alia*, that the 2nd respondent could be disqualified from contesting in the by-election.

Dissatisfied with the Judgment the 2nd respondent filed several applications in the High Court Kota Kinabalu seeking a variety of orders. He also filed a Notice of Appeal to the Court of Appeal which is still pending for hearing to this date. And it was on the basis of a pending appeal that the 2nd respondent applied for a stay of the Judgment.

Hearing of the application of the 2nd respondent was held before the by-election was conducted and as I granted the Stay Order he was therefore allowed to contest. In the by-election the 2nd respondent was declared the winner. Incidentally the 2nd respondent is also the Member of Parliament for the Gaya Constituency of which the State Constituency of Likas is part of it.

The petitioner did not contest in the by-election. But he proceeded to file a notice of motion in the Court of Appeal seeking an order to stay the Stay Order. That was heard on 11 July 2001 by the Court of Appeal. It was subsequently struck out on the ground of lack of original jurisdiction. The petitioner has also filed an appeal against the granting of the Stay Order. Hence there are in fact now two pending appeals between the parties in relation to the judgment. Besides the appeal the petitioner also filed this present application on 11 July 2001. As it was indicated that an immediate hearing was necessary in view of the pending by-election I took the liberty of hearing it in Sandakan on 12 July 2001 which was also the nomination day for the by-election. Unfortunately the parties could not complete their arguments on the same day and it was therefore agreed amongst them that the matter should be continued in Kota Kinabalu on 20 July 2001. Meanwhile the nomination went on as scheduled.

At the outset of the proceeding on 20 July 2001 it was indicated to the court that the appeal by the petitioner was being heard by the Court of Appeal that morning. Hence I adjourned the hearing to enable the parties to find out the result of the appeal. Subsequently the Court was told that the Court of Appeal had adjourned the matter to a date to be fixed. However, the hearing before me could not proceed as the lead counsel for the parties were before the Court of Appeal. I therefore adjourned the matter to 28 July 2001.

On the resumed date learned counsel for the petitioner informed the court that he was seeking for an adjournment since a fresh date in the Court of Appeal was being pursued. Accordingly the hearing was further adjourned to 13 October 2001.

On 13 October 2001 learned counsel for the petitioner disclosed that no date has been given by the Court of Appeal and thus he was prepared to proceed with the argument. However, learned counsel for the 2nd respondent indicated to the court that he would write to the Court of Appeal seeking for a hearing date of his client's appeal. Thus, for that reason another date was given.

Thus, on 16 October 2001 the parties agreed on the preparation and filing of their respective submissions. The court also indicated that the judgment could be delivered thereafter.

During the first hearing of this present application learned counsel for the 2nd respondent raised three preliminary objections, namely, on the issues of *functus officio*, jurisdiction of this court and *res judicata*. I should therefore deal with them first before considering the other points such as on special circumstances and merits of the pending appeal of the petitioner.

Now, on the issue of *functus officio* it was submitted that since the Stay Order had already been perfected and that there was no provision for liberty to apply therein this court had already performed its function. And on the point of jurisdiction learned counsel for the 2nd respondent argued that it would be wrong in law to have a stay order over an earlier stay order. He said that the court had since exercised its discretion by granting the Stay Order and the move by the petitioner would tantamount to asking the court to change its mind. That according to learned counsel is wrong in law since it could therefore mean that in the event of the petitioner succeeding in this application there would be nothing to prevent the 2nd respondent from making another application for stay. Learned counsel said that there would be no finality.

As regards the issue of *res judicata* it was contended that the arguments highlighted in the application had been considered by this court during the hearing of the application of the 2nd respondent. It was also pointed out that the points raised were similar to those that were included in the Memorandum of Appeal filed with the Court of Appeal. And it was the view of learned counsel that the petitioner's remedy should therefore be to pursue his appeal before the Court of Appeal. On the question of urgency and special circumstances as averred by the petitioner in his affidavit learned counsel for the 2nd respondent submitted that most of them are now academic since the nomination for the by-election is long over. Learned counsel emphasised that even the Court of Appeal did not find any urgency for the appeal of the petitioner to be heard.

In reply learned counsel for the petitioner said that the present application is not intended to vary or set aside the Stay Order but merely to stay it pending the disposal of his client's appeal against it. Thus he said that there should

be no question of this court being *functus officio*. And on the issue of jurisdiction the case of *Vijayalakshmi Devi d/o Nadchatiram v. Jegadevan s/o Nadchatiram & Ors* [1995] 2 CLJ 392 was cited to support the contention that in law a stay order over a stay order could be made. Incidentally, a point to note here is that the foregoing case is in fact a reported judgment of the Court of Appeal wherein it is mentioned that such a stay was granted by the then Supreme Court. The position of the interim stay and hearing of the appeal proper is reported in *Vijayalakshmi Devi d/o Nadchatiram v. Jegadevan s/o Nadchatiram & Ors* [1995] 3 CLJ 493 where the stay granted by the High Court was finally set aside by the Federal Court. On *res judicata* it was argued that this application is entirely a fresh application containing issues that were either not argued at all or not fully argued during the hearing of the application of the 2nd respondent. And on urgency it was asserted that the issue involving the 2nd respondent is still 'alive and kicking' since he remains a Member of Parliament and now an elected Assemblyman in complete disregard to the judgment and the report issued by the Election Judge.

In rebuttal learned counsel for the 2nd respondent highlighted that in *Vijayalakshmi Devi*'s case *(supra)* it was the then Supreme Court that gave the stay order. Hence this present application is unsupported by any case law. On *res judicata* it was argued that the petitioner should have brought out those points during the hearing of the application by the 2nd respondent. To do so now would attract the wider principle of *res judicata*.

It is a settled law that the granting of a stay order is discretionary and to be exercised judicially. One basic requirement before a stay can be considered is the existence of special circumstances to be shown by an applicant to the satisfaction of the presiding court. At the same time issues such as those raised herein should also be taken into account.

Having heard the respective contentions of the parties on the issue of *functus officio* and having perused the application itself I find that the petitioner is in fact asking this court to disable the Stay Order pending his appeal against it in the Court of Appeal. Meanwhile it is common ground that the Stay Order had stayed the effects of the judgment upon the 2nd respondent pending the disposal of his appeal before the Court of Appeal. And in the interim the 2nd respondent was allowed by the relevant authority to contest in the by-election. Thus, in so far as preventing the 2nd respondent from contesting in the by-election by reason of the effect of the judgment that is now a non-issue. There is therefore nothing more to disable in the Stay Order connected to the conduct of the by-election.

As for the other stayed repercussions of the judgment it could mean that if the order sought for by the petitioner is granted the Stay Order would be made inoperative. What then would be the effect of the judgment? Would its sting be still wrapped? If so then granting the order prayed for by the petitioner would be an exercise in futile. Further, to say that the judgment would continue to be stayed due to the Stay Order which in turn would be stayed if the application of the petitioner is granted will be very unhealthy for the system and in my view contrary to public interest as a situation would be created whereby the people of the Gaya and Likas Constituencies would be left without any representative so long as the appeals in the Court of Appeal are pending. And going by the argument of learned counsel for the petitioner that it could take as long as five years to have such an appeal disposed of such a long lapse would definitely be not in the interest of the voters in the two constituencies. Unfortunately such a scenario was not addressed by both learned counsel in spite of their lengthy submissions. On my part I would think that the full force of the judgment would be revived. That would mean that the real aim of the present application is that I should review my previous order granted in the exercise of my discretion. To that extent I would think that the objection by learned counsel for the 2nd respondent is not without merit. Hence on this ground alone that I should refuse the application of the petitioner.

On the question of jurisdiction of this court to grant a stay on a stay order I must say that it seems to be a novel point. The case of *Vijayalakshmi Devi (supra)* is not on all fours as there it was the then Supreme Court that granted the stay over a stay given by the High Court. Further, from my reading of the judgment of the Court of Appeal it would appear that the stay in that case was related to a company-winding up proceeding where the law is as restated by his Lordship NH Chan JCA at p. 395:

> A winding-up order could not be discharged or rescinded after it had been made. The only remedy is to apply for a stay of proceedings under the winding-up order: see s. 342(1) of the Companies Act 1965.
>
> The effect of an order to stay proceedings under the winding-up order altogether after a winding-up order has been made is a total discontinuance or termination of the winding-up proceedings.

Hence, I do not think much reliance can be placed on the case cited by learned counsel for the petitioner. Anyway I am of the opinion that there is jurisdiction to hear an application for stay over a stay since it is a matter of discretion. And in considering such an application several factors would come into play, for instance whether the court is *functus officio* as I find in the present

application and thus decline to grant the order sought for by the petitioner. But there may be a situation where a stay over stay is necessary in the interest of justice.

As for the issue of *res judicata* I am inclined to agree with learned counsel for the 2nd respondent that the points raised in this application had been canvassed in the earlier application. And I find that the main excuse of learned counsel for the petitioner on this issue is that there are new points that were not argued or not fully argued during the first application. Indeed he may be right there. But there are also old points being revived which I had already taken into account when granting the Stay Order. Thus, such a stand only enhances my view that indeed the aim of this application is to ask me to revisit my earlier decision made in the exercise of my discretion. That I should not allow and the remedy for the petitioner was rightly pointed by learned counsel for the 2nd respondent in that he should pursue his appeal in the Court of Appeal. Moreover, I think I made it quite clear in my judgment for the Stay Order that some of the points raised in the arguments should be for the higher courts to consider.

On the issue of urgency I find it difficult to follow the reasoning advanced for the petitioner. The Court of Appeal as I understand it had an opportunity to look into the appeal of the petitioner and the end result was that their Lordships did not find any urgency to hear the appeal. However, if the petitioner is convinced that urgency is still prevailing then there is no reason for him to unnecessarily labour before this court when he should be requesting the higher court for a date. For my part I am not persuaded that there is such urgency as to warrant an order to stay the Stay Order.

Accordingly I am inclined to uphold the preliminary objections of learned counsel for the 2nd respondent and thus dismiss this present application of the petitioner. But in the event that I am wrong in my foregoing conclusion I have also considered the merit of this application in particular on the point of whether there are special circumstances prevailing.

Learned counsel for the 2nd respondent submitted that the points asserted by the petitioner as indicators of special circumstances are in fact a reproduction of the contents of the Memorandum of Appeal filed with the Court of Appeal in connection with the appeal of the petitioner against the Stay Order. And it was also averred that some of the issues raised are no longer relevant or that they had been overtaken by subsequent events.

For the petitioner several grounds were brought up to support the ingredient of special circumstances. There are nugatory effect, delay in the disposal of the appeal, public interest and merits in the appeal. A point on the development of the case was also added in.

On the grounds of nugatory, delay and public interest the thrust of the submission is that there could be a long lapse before the appeal could be disposed of. But I think this argument had been answered by the Court of Appeal when the appeal of the petitioner was heard. Their Lordships did not find any urgency as to warrant an early hearing of the appeal. And I would think that the circumstances raised by learned counsel for the petitioner before this court would have been taken into account by the appellate court.

In respect of merits the argument is substantially based on the points raised in the Memorandum of Appeal and they are *inter alia*, that the judgment is not appealable, that the Stay Order has the effect of preventing the implementation of the election laws and the Election Commission from carrying its duties, that a High Court has no jurisdiction to stay a judgment of an Election Court and that the Stay Order is bad in law for want of time frame.

Now, in considering the foregoing argument I would venture to think that the Court of Appeal would have perused those points before adjourning the appeal to another date. And on my part I have considered them and they may convey an arguable case. However, if I were to exercise my discretion and grant the prayer sought for the ultimate consequence would in effect be reversing the Stay Order. That in the circumstances of this matter and for the reasons as discussed above would be quite undesirable and thus the balance of convenience would tilt against granting the order prayed for.

Incidentally the petitioner appears to feel strongly about the points raised before this court in this application. Yet I heard no reason why the petitioner could not have asked for interim stay of the Stay Order from the Court of Appeal when the appeal came up. I am aware that the attempt by the petitioner to move the Court of Appeal by way of motion for a stay was struck out for want of jurisdiction. But there it was an originating process commenced that entailed the invocation by the appellate court of its original jurisdiction.

Learned counsel for the petitioner also submitted that ‘unless our application is granted the Election Commission will continue to be prevented from disqualifying the respondent as a voter or candidate in any election’. And for the purpose of highlighting the development of the case it was pointed out

that the respondent has remained as a Member of Parliament and State Assemblyman. Frankly I should think that the proper party to bring this point is the Election Commission.

I have also read the other points mentioned in Harris's affidavit and I am of the view that they are more appropriate to be presented before the Court of Appeal. I agree that they are concerned with the interpretation and observances of our election process and laws. But I should leave them for the Court of Appeal to determine. The same may be equally relevant to the appeal by the 2nd respondent. As such I do not think much can be gained in my allowing this present application. Both sides should therefore endeavour to seek for an early hearing of their respective appeals.

And with due respect to the petitioner I am also not convinced that he stands out to be affected more than any other citizens of the State or the voters of the two constituencies by the alleged continuing infringement of the relevant laws after the delivery of the judgment. If anyone has the duty or right to complain it should be the Election Commission.

Accordingly the inevitable conclusion is that I should dismiss this application with costs to the 2nd respondent to be taxed unless agreed.